No. 10730 K/11TG

In the United States Circuit Court of Appeals for the Ninth Circuit

F. S. LACK,

APPELLANT,

vs.

WESTERN LOAN AND BUILDING COMPANY, a corporation, and PEARL ASSURANCE COMPANY, LTD.,

APPELLEE.

APPELLEE'S BRIEF ON SECOND APPEAL

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INDEX TO CASES CITED

TEXT BOOKS

In the
United States District Court
Southern District of California
Central Division

WESTERN LOAN AND BUILDING COMPANY, a corporation, *Plaintiff,* vs. F. S. LACK, PEARL ASSURANCE COMPANY, LTD., a corporation, *Defendants.*	**In Equity No. 1301 Civil O'C**
F. S. LACK, *Plaintiff,* vs. WESTERN LOAN AND BUILDING COMPANY, a corporation, *Defendants.*	**In Equity No. 84 S.D. Civil O'C**

STATEMENT

The claims here relate to:

1. Damages for alleged delay in conveying hotel property to Lack.

2. Interest on part of the insurance money paid into Court by the defendant Pearl Assurance Company, Ltd., and on prior appeal award to Mr. Lack.

There is quite a little confusion in appellant's brief as to what was actually involved in these two cases.

The one case here involved, 84, was an action by Lack, as plaintiff, for a judgment compelling Western Loan and Building Company to specifically perform its alleged covenant to repair the hotel under the twenty-day provision of the contract, or to pay, "in lieu thereof," damages. This complaint, after alleging the earthquake and the refusal of Western Loan and Building Company to repair, recites (R. 33) that on December 31, 1940, which was the last day of the term of six years provided in the lease and option agreement, Lack had tendered payment of the purchase money to Western Loan and Building Company as the purchase price

> "when the defendant shall deliver to the plaintiff a deed for said hotel property, *when said damage caused by said earthquake has been repaired,* but that defendant has refused and failed and neglected at all times and does now refuse, fail and neglect *to repair* the same * * * to the damage to this plaintiff in the sum of $100,217.87. That there is no other adequate remedy at law.
>
> WHEREFORE, plaintiff prays judgment against the defendant
>
> 1. For a decree of specific performance of Exhibit "A" and that the defendant be ordered to *repair the damage* done to the hotel property by said earthquake and that said insurance money be used to defray the cost of said repairs, together with damages to this plaintiff for loss of profit by reason of non use of said hotel property, *or in lieu thereof;*
>
> 2. Damages in the sum of $100,217.87 together with interest thereon at the rate of 7% per annum from August 15, 1940 until paid in full." (R. 34).

This is the theory of Case No. 84. This issue took up most of the time of the trial Court, and it was decided that Western Loan and Building Company was under no duty to make the repair, and so found by the Court. This Court in its decision on this matter says:

> "Western was under no obligation to make such repairs or to pay the cost thereof."
>
> There is no other suit or claim for specific performance for restitution or for damages.

The other case, No. 1301, was brought by Western against the insurance company to collect the earthquake insurance on the property. In this case, Mr. Lack was interpleaded, to determine which of us was entitled to the insurance money. In his answer, he claimed to be entitled to it by reason of the said twenty-day covenant in the lease for repair of the building, if repairs could be made in twenty days. Any other repairs were by the contract to be made by him.

The insurance company answered and tendered the amount of the insurance, $28,067.87, into Court to be paid to the party determined to be entitled thereto. In this case we alleged that the option in Lack's lease had not been exercised, but we offered to deed the property and accept payment as if it had been exercised.

This offer was refused by Lack, who claimed we must repair and restore the property.

This Court, on appeal, found that he had exercised the option, mainly by the mention in the insurance policy furnished to Western that he had a secondary interest by

reason of a "contract to purchase." That issue is, therefore, settled. On that, the opinion of this Honorable Court says:

> "Having exercised the option, Lack was obligated to pay Western the purchase price of the property ($35,000), plus interest, less quarterly payments made by him, as provided in the contract, and Western was obligated to convey the property to Lack upon receipt of the purchase price, plus interest, less such quarterly payments. Lack's quarterly payments prior to May 18, 1940, were sufficient to pay $15,750 of the purchase price, plus interest to July 1, 1940, leaving an unpaid balance of $19,250. Thus, of the $28,067.87 for which Pearl was liable under its policies, $19,250 was payable to Western, and $8,817.87 was payable to Lack.
>
> "Lack claimed the entire $28,067.87, including Western's $19,250. The ground of his claim was that, by the terms of the contract, Western was obligated to repair the damage to the building at its own expense, but had failed to do so; that Lack, therefore, was entitled to make such repairs at Western's expense; and that such repairs would cost more than $28,067.87. The claim, in so far as it related to Western's $19,250, was properly rejected; for, as said before, the damage to the building could not be repaired in 20 working days. Therefore Western was under no obligation to make such repairs or to pay the cost thereof.

Pursuant to this decision, and after the first three motions and petitions of Lack hereinafter referred to for a modification or change of the decision of this Court so as to allow damages and interest, the mandate went down. It said:

> "this cause be, and hereby is remanded to the said

> District Court with directions to enter judgment awarding to Western Loan and Building Co. $19,250 of the $28,067.87 deposited by Pearl Assurance Co. in the registry of the court, awarding to Lack the balance $8,817.87) of said $28,067.87 and requiring Western Loan and Building Co. to convey to Lack the Hotel Dunlack building in Brawley, California, the land on which the building stood, * * * "

It was ordered that we pay the costs on appeal, and these were taxed at $1122.97. That was all.

After the recital as to cost, the mandate in the printed formal portion thereof recited:

> "You, Therefore, Are Hereby Commanded, That such execution and further proceedings be had in the said cause in accordance with the opinion and decree of this court and as according to right and justice and the laws of the United States ought to be had."

It will be noted that although the findings and decree (R. 76-94) recited in considerable detail the several issues that were present, and direct findings are made on these issues, and notwithstanding the agreement of the parties here on the pre-trial hearing, that the principal issue was our failure to repair the property as shown in the record 230-231, 258-259, 129-130 and 134, that all but one of these findings were undisturbed, and the only modification directed was as above specified in the mandate.

The trial Court was reversed only on the one finding that Lack had not sufficiently indicated his intention to exercise the option. The other matters in the opinion and mandate of allotting to us $19,250.00 of the insurance

money, as payment on the property, and the order to convey upon such payment, followed, necessarily, the reversal on this one issue.

The remaining issues stand as decided and, of course, cannot now be changed.

All of the mandated directions of this Court to the trial Court have been ordered by the trial Court and complied with by us:

(a) delivery of deed of conveyance to Lack, with title policy (15-17)

(b) payment to him of Lack's portion of the insurance money (16-17)

(c) payment of costs on appeal (17)

The matters here claimed, while repeatedly presented to this Court and here refused, were likewise refused by the trial Court. They were refused by this Court on good grounds, as we shall attempt to show. But whether so refused or not, the orders of this Court are final and conclusive. They were, of course, refused by the trial Court because it could not change its original findings and decree in any respect, except as ordered by this Court, and this Court had not, but had repeatedly refused to so order it.

BRIEF AND ARGUMENT

This appeal will be briefed and argued upon three points as follows:

1. That both the matters of alleged damages and interest have been heretofore presented to this Court and decided adversely to the appellant.

2. That there is no basis for, or right to, damages for delay or refusal to convey the property.

3. That appellant is not entitled, to recover from Appellee, interest on money deposited with the Clerk of the District Court by the insurance company.

I
PRIOR ADJUDICATION

These two matters have been heretofore presented to this Court by four different motions, and in the main brief of appellant, and have been heretofore adjudicated and settled.

(1) Immediately after the decision of this Court came down, Lack filed a motion to this Court to direct the "terms of the remittitur" so as to cover these matters.

(2) This was followed by a petition for "modification of opinion and decree" so as to include them.

(3) Thereafter, an application was made to change the second petition to a "petition for rehearing" covering the same.

(4) After these motions had been considered and denied and the remittitur sent down, appellant filed here a fourth "motion to recall mandate and for modification of judgment."

All of these motions are in the Record and before this Court. Furthermore, they were briefed, and the same line of authorities cited as now. The authorities then, and now, cited indicate that this Court had jurisdiction and authority to act upon each and all of these motons, and it did.

We call attention, also, to the fact that in his main brief on the first appeal, Lack argued that he was entitled to damages against us "to be found by a referee" and set forth a heading: "Damages for Delay with Specific Performance are Recoverable." Also another heading: "Special Damages of Lost Profits May be Recovered."

Under these headings, commencing at page 45 of the main brief, there were cited sixteen different cases and authorities. So that this contenttion was thus additionally made to this Court on the first appeal. (See also Lack's Reply Brief, first appeal, p. 16).

Appellant is not here appealing from, and, of course, he cannnot appeal from, the denial by this Court of the demand for further modification of the original judgment. This Court did not make these modifications in its opinion, and repeatedly denied Lack's motions to change its decision so as to make them. Thus, these matters are adjudicated and settled.

The authorities cited on these motions, and now cited, indicate that this Court had the jurisdiction and power to pass upon these matters, and the authority of this Court so to do, was never questioned. On the other hand, this Court ruled upon each and all of these motions and denied them. The trial Court, of course, could not include these matters in its decree, to conform its findings and decision to the opinion of this Court without attempting to overrule these decisions of this Court. It could not change its former judgment, without direction from this Court. It had no jurisdiction or authority so to do.

The following cases, some of which have been cited by appellant, emphasize the jurisdiction of this Court to pass upon these matters as they were presented; also the duty of the trial Court to correct its judgment only in the respects directed by this Court, and denying its authority or jurisdiction to otherwise alter said judgment. Incidentally, some of these point out that no interest can be charged on money deposited into the registry of the court under the circumstances here.

Thornton v. *Carter,* 109 Fed. (2d) 316 is not exactly in point, because that case was remanded for "further proceedings," and not for such specific modifications, as here. The mandate, however, said nothing about interest or damages by delay. It was contended that the trial Court should have allowed these. On the second appeal, the court held to the contrary.

The appellate Court stated also that the judgment of the trial Court, save only in the respects modified by the appellate Court, was final and conclusive. The opinion says:

> "Since, however, a final judgment upon the merits concludes the parties as to all issues which were or *could have been decided* * * * it is obvious that such judgment of this Court on appeal puts all such issues out of the reach of the trial Court."

It was held that the trial court was correct in refusing interest on the money deposited with the Clerk of the trial Court and which had been withdrawn pending the first appeal by one of the parties.

The case cites a number of authorities on the point above quoted, and that the decision of the trial Court, except as expressly modified, is *res judicata.* Among the cases cited is *Guettel* v. *U. S.,* 95 Fed. (2d) 229; 118 A.L.R. 1060.

We agree with the statement of appellant supported by the Goldwyn case cited from 287 Fed. 100 that the trial Court is without power to do anything contrary to or in addition to that set forth in the mandate of the appellate Court.

Clark v. *Hot Spring Electrical Co.,* 76 Fed. (2d) 918 is a case very much in point. The case was appealed and modified in certain respects. The principal one was that the mandate directed the trial Court to make allowance for certain cost of preparation of a mortgage foreclosure proceeding involved. Upon its remand, application was made for the allowance of interest pending the appeal. The trial Court refused to allow this, it not being expressly ordered by the mandate. On second appeal, it was sustained. The opinion said:

> "The trial Court had no authority to alter or review the decree in any other particular. Gains v. Rugg, 148 U. S. 228; 37 Law Ed. 432. The trial Court was without authority to modify the decree, after affirmance, by adding to it a provision as to interest or by changing the allowance of counsel fees. * * * "

Groves v. *Sentell,* 66 Fed. 179 is a good case upon the matters here presented. It indicates that the printed stock phrase in mandates reciting that the trial Court is to make such execution of the mandate as is "according to right and justice" adds nothing to the expressed modifications

in the opinion and mandate. It also discusses the question of the right to interest where the suit is over money due from a third party and deposited into court, and the litigating parties are attempting to determine their respective interests therein. It holds that none can be collected.

This case involved a mandate from the Supreme Court, and while it recited "the decree is reversed," it contained a specific mention of the matters to be changed by the trial court, just as did the mandate in the case at bar. Certain sums were to be paid to certain named parties, with certain interest specified and certain costs as to some. Funds had been paid into the Clerk of the court. The opinion points out that as to such funds, just as in this case, that the judgment and mandate "was not a personal decree against any of the parties to the suit, except for the sum of $349.00 costs."

The proposition contended for was that one of the parties, who had paid the money into court, pending the suit, should pay interest thereon, "and they further prayed that this matter be referred to a Master to determine what further amount may be due these respondents by complainant as interest until final payment * * * and also what costs are due these respondents."

The opinion points out that these matters were not contained in the mandate, but it must, nevertheless, be presumed that the Supreme Court considered them. The following propositions are stated:

> "We are bound to presume that the Supreme Court, in their decree, passed upon this issue, and neither from the mandate nor from the opinion rendered

> by the Court can we infer any intention to leave undecided any issue in the case or in anywise refer the same to the Circuit Court for future disposition.
>
> * * * * *
>
> "When the Supreme Court prescribed the decree to be entered in the Circuit Court in such specific terms as the record shows, there was nothing left for the Circuit Court to do in the premises but to enter the decree prescribed by the Supreme Court, and execute the same."

It seems to us, just as conclusively here, that all questions now in this case were considered and settled on the first appeal, and that these questions cannot be injected again, or allowed at this time.

> *Mulhens and Kroppf* v. *Mulhens*, 48 Fed. (2d) 206
> *Kosack* v. *U. S.*, 54 Fed. (2d) 72.

These cases have heretofore been cited to this Court by appellant. They also hold that any change or enlargement of the appellate court's opinion here, or of its mandate, were within its jurisdiction; and that application to it was the proper procedure, and, that its denial constitutes a disposition of the questions so raised.

Appellant here, at the opening of his brief (p. 4) says:

> "It is unfortunate for Lack that this Court did not see fit to follow the procedure outlined in Mulhens and Kroppf v. Mulhens."

There is no reason to believe that this Court did not follow the procedure outlined. Petitions were made to it as in that case, and it considered and denied the petitions of appellant. This Court also, it is to be assumed, considered the argument presented in Appellant's briefs on

the main appeal for the very modifications of the original judgment now contended for.

Other authorities might be cited, and other will be noticed under the additional points.

Appellant has clearly confused this issue by citing cases in which the judgment of the trial Court was entirely reversed and where cases were remanded with directions to the trial Court to take further proceedings not inconsistent with the opinion of the appellate Court. There was no authority given to open these cases for further trials.

II
DAMAGES

A good deal is said here by appellant about a suit for "specific performance." The suit of that nature was 84, one to require us to specifically perform the alleged duty to repair the building wherein Lack asked for specific performance, or, in the alternative, damages for our failure to so perform. Any matter of proof of damages, or statements on the trial with reference thereto, related to this case and contention.

The word "restitution" is used by appellant throughout the brief, without being tied in to any specific thing involved here, and with considerable confusion as to what is intended. This brief will be given further notice. However, at this point we will discuss point two more affirmatively.

So far as possession of this property is concerned, Lack has never been deprived of it. He alleges (R. 16) that he took possession of said property January 1, 1936 and "has been ever since the said January 1, 1936 and now is

in possession of said property * * *'' The only reference to any intended surrender of possession is the allegation (R. 31) that he tendered it to us for the sole purpose, and conditioned upon, our repairing the same as he alleged we were required to do. He further testified at the trial that he lived in the hotel after the earthquake (R. 650) and that he continued to lease portions of the premises (R. 56; 649). We have never been in possession of any of this property since January 1, 1936.

Now as to our duty to convey, it is needless to recite that we were under no obligation to convey title until the property was paid for, as in the lease and option agreement provided.

Lack's tender on the last day of the six-year period of the contract, to make payment, was specifically conditioned upon our repairing and restoring the building. As pointed out in our main brief, such a tender containing such condition, not required by the contract, was invalid as such.

This Court, on appeal, found that Lack had sufficiently indicated his intention to exercise the option, principally by recitals in the insurance policies, so that that matter has been settled. But this Court did not hold that we were required to deed the property prior to the payment in accordance with the option agreement. It held the contrary, and said:

> ''Having exercised the option, Lack was obligated to pay Western the purchase price of the property ($35,000.00), plus interest, less quarterly payments made by him as provided in the contract, and Western was obligated to convey the property to Lack *upon receipt of the purchase price,* plus interest, less quarterly payments.'' (11).

The opinion then sets up the amount that Lack would owe if he were entitled to exercise his option as $19,250.00. The opinion then provided that this may be paid out of the insurance money deposited by the insurance company. The opinion then points out:

> "Lack claimed the entire $28,067.87, including Western's $19,250.00. * * * The claim in so far as it related to Western's $19,250.00 was properly rejected; for as said before, the damage to the building could not be repaired in twenty working days." Neither party could act, to carry out the judgment while the case was on appeal.

It is thus apparent that the payment to us of the balance of $19,250.00 out of the insurance money was never tendered by Lack. On the contrary, he alleged and maintained that we were entitled to none of it, as the opinion of this Court clearly points out.

The only right or authority that either of us ever had to carry out this option or apply this portion of the insurance money to the payment of the balance of the purchase price of this property came after and as a result and effect of the opinion of this Court. Lack would not accept it. This opinion (p. 12) directed the trial Court "to enter judgment awarding to Western $19,250.00 of the $28,067.87 deposited by Pearl in the registry of the Court, awarding to Lack the balance $8,817.87) * * * and requiring Western to convey to Lack all the property herein above mentioned."

As recited in the decree of the trial Cout entered pursuant to said mandate, this was promptly carried out.

Much is said about our having "breached our contract" to convey and "damages for failure to perform." We desire to point out to this Court again, that we repeatedly offered to permit Lack to exercise this option or to make enveyance upon the balance of the purchase price "as if he had exercised his option." He refused throughout, unless we would first repair the building. In a letter dated September 27, 1940, we called his attention to our offer to do this as a means to giving him all the protection that we could give. We called attention to his conversation with our Mr. Richardson and the proposition then suggested, which was stated:

> "We would be willing to permit you to have the amount of the insurance money over and above the amount that would have been required to pay us out, if your option to purchase thereunder had been exercised while the lease was in effect, and that we would also convey our interest in the property to you * * *" (See also R. 747).

In our pleading his Case No. 1301 (paragraph IX, R. 8) we alleged that we had made this offer, and set it out again and said:

> "Plaintiff has thus tendered protection of any possible interest said defendant F. S. Lack may have had in said policies or the property covered thereby, and to thus restore him to the status he would have had, if he had not defaulted on the lease and option agreement and had exercised the option therein provided."

We then specifically tendered to Lack the balance of the insurance fund and invited him to file his acceptance.

Appellant Lack rejected our offers and alleged in his answer (paragraph VIII, R. 14-15)

> "In answer to paragraph IX of plaintiff's complaint, this defendant admits that the plaintiff made such an offer, but in that respect this defendant alleges that said $28,067.87 is about $15,000 short of being sufficient to completely pay for the damage done to said premises by said earthquake and that the plaintiff has at all times herein mentioned and does now refuse, fail and neglect to repair said damage or to pay for the same except as contained in said offer as alleged in paragraph IX of said complain."

See also the stipulation of Mr. Schaefer at the pre-trial hearing (R. 238) where Lack's counsel refers to the offer of the Western Loan and Building Company to convey to Lack the hotel and where Mr. Schaefer expressly refuses the offer:

> "Mr. Schaefer: Now, Mr. Mulliner says in this paragraph that what he offered Mr. Lack was that they deduct whatever was due them and give him the deed and hand them back a damaged hotel. We will admit that he made an offer, but we also want to stipulate that we rejected it." (27)

While it is probably the law that in an action for specific performance to convey property, damages may be claimed, and, by an equity court allowed, for failure and refusal to make conveyance, it certainly is not the law that a party can be assessed with damages for failure to convey where tender of conveyance is offered in accordance with the agreement between the parties, and that offer directly and emphatically refused.

Bu-Vi-Bar Petroleum Corp v. *Krow* (10 C.C.), 40 Fed. (2d) 488; 69 A.L.R. 1295. This case discusses an analogous situation where there had been an offer to proceed and

perform a contract on the one side, and a rejection and repudiation on the other side. The case holds that, while such rejection is unretracted, by one party, the other party is under no duty to perform.

> "A continued willingness upon the part of the injured party to receive performance is an indication that, if the repudiator will withdraw his repudiation, but not otherwise, the contract may proceed. It is not an irrevocable election not to treat the renunciation as a breach. Section 1334 supra. The refusal to retract amounts to a continuation of such renunciation. Zuck v. McClure, 98 Pa. 541."

Following this case, at 69 A.L.R. 1303, there is a note. It is not directly in point, but cites a number of cases supporting the proposition next above stated.

See also *Midwest Elc. Co.* v. *Midwest Gen. Elc. Sup. Co.* (8 C.C.), 36 Fed. (2d) 213.

Referring now to the Lack brief on this, several inaccurate statements are contained in the opening portion thereof. It is said that this Court held that "Western had breached its contract in refusing to convey the hotel." We find no such holding, but only the statement that Western would be obligated to convey, upon "receipt of the purchase price."

The brief then admits that some delay was caused by litigation as to the repairs. It is then wrongfully stated that "Western has unlawfully withheld the property from Lack, causing very heavy damage." The statement is then made that Lack in his original pleadings demanded specific performance, together with damage for loss of profits.

If he did, it was before the trial Court, and before this Court on the first appeal, and is settled. Neither Court has further jurisdiction to review these matters.

The alleged payments made by Lack referred to on page 6 were largely for operating materials during the approximately 5½ years he operated. No competent evidence was offered on this, and this related to damages for our failure to repair. It is not material here.

The claim that he could have repaired the hotel in 1941, may be questioned. In any event, he was never deprived of that right. We always contended that it was not only his right, but his duty to repair. He had possession.

The argument on page 8 is entirely erroneous. The statement in the printed portion of the mandate commanding the trial Court to proceed "in accord with the opinion and decree of this Court as according to right and justice and the laws of the United States ought to be had," added nothing to the specific directions of the mandate. There appears to be no authority to the contrary. It simply means that the directions in the mandate are "according to right and justice," and are to be carried out. So far as we have been able to find, substantially such language is contained generally in mandates from appellate Courts, both Federal and State, whether they contain specific directions as to certain issues, or an order of general reversal and/or re-trial.

Since the remainder of the brief refers to interest also, we will review that in connection with the next point.

III
INTEREST

This matter of interest has likewise been presented to and disposed of by this Court. It was in all four petitions. In addition to that, a mere statement of the facts with relation to the fund here, when considered in connection with the decision of this Court, and the absence of any direction in the mandate, would appear to eliminate all the authorities cited by appellant. In awarding a portion of the insurance fund to Lack, this Court said:

> "Thus, of the 28,067.87 for which Pearl was liable under its policies, $19,250 was payable to Western, and $8,817.87 was payable to Lack."

Then after reciting that Lack erroneously claimed the whole $28,067.87 and that his claim as to the $19,250.00 was properly rejected, this Court, in conclusion, says:

> "The case is remanded with direction to enter judgment awarding to Western $19,250 of the $28,-067.87 deposited by Pearl in the registry of the court, awarding to Lack the balance ($8,817.87) of said $28,067.87."

We were not sued by Lack in Case 1301 on an indebtedness due him from us. It may be conceded that in a case where a suit is brought by one party against another upon an obligation to pay money, and it is found that there was a sum of money due at a certain time, the court may and should include in the judgment interest from the date on which the sum was due. Such cases as this, are relied upon by appellant.

Here, we sued the insurance company for this fund, and they deposited it in Court. In that suit, we indicated

that Lack may have an adverse claim and interpleaded him. He asserted such, and the above mentioned portion of the fund was by this Court finally awarded to him. We had already offered it to him, and that offer had been rejected.

This Court did not order any money judgment entered against us in favor of Lack, and there was never any pleading upon which such an order or judgment could have been made. It is true that after the award to us, and before the appeal, the Clerk, after deducting his fee of 1%, paid the money to us.

When the appeal was afterward taken, we, of course, could not use the money, which had been placed in *custodia legis*. We had to hold it awaiting the disposition of it by this Court. No supersedeas bond was filed on the first appeal. Any withholding or delay was not our fault. As was pointed out in *Groves* v. *Sentell,* supra., if there was an error, it was the trial Court's error. We restored Lack's portion to the Court's custody immediately.

There is no more reason why we should pay Lack interest on his $8,817.87 than that he should pay us interest on the $19,250,00 which he, through the trial and throughout the appeal in this Court, claimed to be entitled to. The trial Court had no authority to grant Lack's motion to charge us with interest. It was not in the mandate, and his petitions theretofore in this Court, had been denied.

Clark v. *Hot Springs Electrical Co.,* supra, directly holds that the trial Court was without authority to allow interest.

American Surety Co. v. *River,* 269 Fed. 137 (8 C.C.) furnishes additional light upon this question. There the trial court had entered a judgment in a direct suit on an insurance contract without allowing interest. The appellate court modified the judgment by directing the allowance of interest on the amount found due. The trial Court added interest to the date of its original judgment. Mandamus was brought to compel the addition of interest to the date of mandate.

The holding of the Court is reflected in the syllabus as follows:

> "A mandate issued by an Appellate Court directing the modification of the decree appealed from, by including therein interest on the sum recovered by the complainant from the time it becomes entitled thereto, *held* to require the allowance of interest only to the date of the original decree, which as so modified, was affirmed and not to the date of the mandate."

Groves v. *Sentell,* 66 Fed. 179, supra, points out that the awarding of the funds deposited in Court was not a personal judgment against any of the parties to the suit. It holds that interest was not payable thereon.

Kirkpatrick v. *Great* Am. Ins. Co., 299 S.W. 943 holds unsuccessful claimant of funds in registry of court in interpleader not liable for interest thereon.

Appellant's Authorities:

In citing authorities, the Lack brief confuses somewhat the question of interest with that of restitution. We have read the authorities cited. Most of them appear to have no application here. These include the cases previously

cited to this Court, and on the same contentions to the trial Court. We find among them no authority supporting the contention that the trial Court under this mandate had authority or jurisdiction to either add interest or assess damages. These cases at best, appear to indicate only, that upon a partial reversal or modification of a judgment, it is the function of the appellate Court to order, or refuse to order such restitution, as its decision may indicate. This was done.

Commencing on page 10, 2 Cal. Jur. cited, contains simply a statement that if an erroneous judgment is entered and reversed, the "appellate Court" may upon reversal make complete restitution of the property lost by the erroneous judgment.

Bertholdi v. *St. Louis RR Co.,* 80 Fed. (2d) 32 involved claims for overchages on freight. The railroad company's property went into the hands of a receiver, and it was attempted to charge him, as trustee, and make the claims a preferred claim as against the mortgage holder. That was the issue in the case, and the decision was in favor of the receiver.

Freeman on Judgments, Sec. 482 simply indicates on the subject of restitution that upon reversal, "the plaintiff is not required to restore a sum in excess of that which he has received under his judgment."

B & O RR Co. v. U. S., 279 U. S. 781 simply held that on rates, excess amounts paid the railroad company for shipping, as assessed by the Interstate Commerce Commission, interest could be collected from the date of the excess payments. There appears to have been an entire

reversal of this case for further proceedings, and the opinion indicates that the mandate was controlled by the appellate Court.

Kreske and Co. v. Wingate, 102 Fed. (2d) 740, which is apparently cited in criticism of this Court, for not recalling its mandate, is a case which casts doubt upon whether Lack's remedy, if he has any, is by second appeal in this case. The opinion there said:

> "If the trial Court has mistaken our meaning * * * mandamus * * * is the classical remedy."

However, we do not raise the point, as we think this Court has already decided everything now attempted to be brought before it.

Appellant here indicates in its brief that this Court thought that the trial Court would construe its mandate as covering interest and damages. If Lack had so thought he would not have so immediately and persistently demanded thta this Court include these matters in its mandate. If this Court had so thought, it would have upon such petitions doubtless said so, as did the appellate Court in the Kreske case. That the trial Court did not consider that the mandate authorized him to add interest and damages, was indicated to this Court as set out at page 3 of appellant's brief, when its motion and affidavit was filed here reciting that the trial Court did not so understand the mandate. This Court then knowing this, denied appellant's motion to "recall mandate," etc.

The Kosack case cited at page 11 of the brief has already been cited by us.

We have no argument with the authorities cited on pages 12, 13 and 14, nor do we think that they have any application here.

In the Second Point, on page 15, the brief says, "Western having breached its contract to convey," etc., this begs the question. There was no such breach. Immediately after this Court authorized us to use $19,250.00 of the insurance money as payment for the property, we made conveyance, with title policy furnished, as recited in the judgment of the trial Court. (15-17).

The authorities cited under this are to the effect that where there is breach of a duty to convey, equity may award damages for failure to convey in the same action. We have already conceded that an equity Court has this power.

Appellant continuously overlooks the decision of this Court that we had no duty to repair this building; that Lack had this duty under the general provisions of the contract; that the law is now settled, and under it as settled, he could have proceeded at any time to do this. We insisted that he do it, and offered to turn over the whole of the insurance fund for that purpose and, in addition thereto, to put up a portion of the additional money required. (R. 747).

The trial Court has held that it could not have been repaired by either one of us within the term of the lease. No one can tell when this hotel might have been repaired under the conditions which arose, or what Lack might have made out of it after the time of its repair, if this

could have been accomplished. One point is certain, we did not have the duty to repair it.

It is equally certain that any loss of profits was not due to the mere passing of a deed, but was due to the damage to the hotel by the earthquake.

As pointed out in our petition and brief for a rehearing (p. 11) herein, we were never repaid the $3777.40 of taxes that we advanced for Lack, and that while he put no money in this property other than that taken out of it by him as profits from it, that he did gain from it a very substantial sum, while we have lost about half of the $100,000 we put up to build the hotel. (See our main brief p. 2).

The cases cited by appellant at pages 19 to 24, are upon the propositions that damages for delay may be recovered in specific performance actions, and with this general principle, we have no dispute. Cases are also cited under the proposition that where there is a repudiation by defendant of his contract, damages may be recovered. There is nothing of this character involved in this case, and no damages occurring by reason of any repudiation on our part.

It is next suggested, at page 25, that Lack's pleadings in Case No. 84 are sufficient to entitle him to damages. We have already pointed out that these were considered by this Court on the first appeal, and this relief refused.

Coming then again to the question of interest, at page 27, appellant cites again the B & O R. R. Co. v. U. S., 279 U. S. 781 and the Bertholdi case, supra, and other cases, to the effect that where there is a contract to pay

money, and judgment is entered thereon, interest may be included. This we do not deny.

Trial Costs, and Clerk's 1% Deduction:

The incidental questions of costs in the trial Court and the deduction by the Clerk, of the trial Court, of 1% on the insurance money deposited, were urged with the two questions above mentioned in the previous petitions and motions of Lack filed in this Court, and in the proposed decree after mandate in the trial Court. They are suggested in the "notice of appeal here." In the argument, however, they appear to be abandoned, and will, therefore, be only briefly noticed.

The Clerk deducted his regular 1% on the deposit, which amounted to $88.17 on Lack's portion of the deposit, and $195.00 on Western's portion. The contention is intimated that we should stand his deduction and ours too.

As above pointed out, there was no judgment against us in favor of Lack for either of these amounts. This Court simply directed that the trial Court enter a judgment "awarding to Western $19,250, * * * awarding to Lack the balance ($8,817.87) * * *"

The awards were so made, but due to no action by either party, each of us received 1% less on each award. This difference was not withheld by us, but by the Clerk. And if there is any claim by either of us, it appears that it is not against the other party here. There is no basis or reason why we should restore this amount to Lack.

On the matter of trial costs, as already pointed out, the main issue, and some other issues of the case, were

decided in our favor. Practically, if not all, witnesses that were called, were called on the main issue as to our duty to repair. In the trial Court, because we had claimed the furniture and furnishings under our bill of sale, and these were awarded to Lack, the trial Court in entering its judgment said:

> "Neither party is entitled to costs, and no costs are awarded."

On the single issue as to whether Lack had sufficiently indicated his intention to exercise the option, this Court reversed the trial Court. This left the issues as originally framed and tried, as being decided partly in favor of one party and partly in favor of the other party to the litigation, so that neither could claim the right to assess trial costs as against the other.

This judgment that neither party be awarded costs has never been appealed from or changed in any manner. And it is now beyond the jurisdiction of either Court to change it.

Furthermore, both of these claims have repeatedly been presented to this Court, along with the other matters above discussed, and have been decided adversely to appellant and adjudicated and settled. The discussion under Point I applies to these, the same as to damages and interest.

CONCLUSION

It, thus, appears that the matters now attempted to be raised by this appeal were raised, by appellant, on the first appeal. The judgment as entered, and then appealed from, was not reversed or modified in these respects. That the same contention that is now attempted on this appeal as to the modification of the original judgment in these respects, was presented to this Court in the main briefs, and in the four different motions. That this Court had jurisdiction, and decided said matters adversely to appellant by the denial of said motions. It also appears that such decisions were just under the facts as shown by the record, at that time and now.

It is further evident that in the absence of a modification of the trial Court's judgment, by this Court, and a direction to change or modify said judgment, the trial Court had no authority, power or jurisdiction to make the changes and modifications which it is now contended that Court should have made, and on which this appeal is based.

It is, therefore, submitted that the appeal is without merit, and that the judgment as entered by the trial Court on the mandate should be affirmed.

Respectfully submitted,

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